

Automatic Stay (Reinstate)
Excusable Neglect
FED Action
Fed. R. Bankr. P. 9024
Fed. R. Civ. P. 60(b)(1)
Fed. R. Civ. P. 60(c)(1)

Patricia Jimmy Sue Wishon, Case No. 09-31219-rld13

8/12/09

RLD

Pub.

A default order was entered granting relief from the automatic stay as to real property in which debtor claims an interest. More than six weeks later, after debtor had unsuccessfully defended, in person and with witnesses, an FED action in state court with respect the property, debtor moved to reinstate the automatic stay on the basis that she had not been served with the motion seeking relief from the automatic stay.

The bankruptcy court treated the motion as one brought under Fed. R. Civ. P. 60(c)(1), applicable in the contested matter pursuant to Fed. R. Bankr. P. 9024, seeking relief from a final order based on alleged "excusable neglect" pursuant to Fed. R. Civ. P. 60(b)(1). Applying the analytical framework set forth in Pioneer Investment Services Co. v. Brunswick Assoc. Limited Partnership, 507 U.S. 380, 395 (1993), the bankruptcy court denied the debtor's motion. The bankruptcy court found the debtor was not credible in her assertions that she had no notice of the relief from stay motion in time to defend it. In any event, the debtor's delay in seeking reinstatement of the automatic stay resulted in prejudice to the creditor, who incurred the expense of prosecuting a contested FED action in state court, that outweighed any prejudice that debtor might have suffered based on entry of the default order where debtor's interest in the property at the time relief from the stay was granted was, at most, possessory, and where debtor has retained her remedies under state law.

P09-13(28)

1
2
3
4
5
6
7
8
9 UNITED STATES BANKRUPTCY COURT
10 FOR THE DISTRICT OF OREGON

11 In Re:) Bankruptcy Case
12 PATRICIA JIMMY SUE WISHON,) No. 09-31219-rld13
13 Debtor.) MEMORANDUM OPINION
)

14 On July 17, 2009, I heard evidence and argument at the final
15 evidentiary hearing (the "Hearing") on 1) the Court's Order to Show Cause
16 why this bankruptcy case should not be dismissed as an abuse, with a 180-
17 day bar to refiling, and 2) the debtor's Emergency Motion to Reinstate of
18 [sic] Stay Regarding Homestead ("Motion to Reinstate Stay"). The debtor,
19 Ms. Patricia Jimmy Sue Wishon ("Ms. Wishon"), and Katrina E. Glogowski,
20 Esq. ("Ms. Glogowski"), counsel appearing for JP Morgan Chase Bank, NA
21 (the "Bank"), both testified and argued at the Hearing. At the
22 conclusion of the Hearing, I ordered a transcript and took the matters
23 under submission.

24 In deciding these contested matters, I have considered
25 carefully the testimony presented and exhibits admitted at the Hearing,
26 as well as the arguments presented orally. I further have taken judicial

1 notice of the docket and documents filed in Ms. Wishon's chapter 13¹
2 case, Case No. 09-31219, as well as the docket and documents filed in Ms.
3 Wishon's prior chapter 11 case, Case No. 07-30869, for the purposes of
4 confirming and ascertaining facts not reasonably in dispute. Federal
5 Rule of Evidence 201; In re Butts, 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa.
6 2006). In addition, I have reviewed applicable legal authorities. In
7 light of that consideration and review, this Memorandum Opinion sets
8 forth the Court's findings of fact and conclusions of law under Federal
9 Rule of Civil Procedure 52(a), applicable with respect to these contested
10 matters under Federal Rules of Bankruptcy Procedure 9014 and 7052.

11 Factual Background

12 This is not Ms. Wishon's first bankruptcy case. In fact, Ms.
13 Wishon apparently is no stranger to legal proceedings. She testified at
14 the hearing that, "I've been in and out of court since '02, '03."
15 Transcript of July 17, 2009 Hearing ("Hearing Transcript"), Docket
16 No. 59², at 6.

17 Ms. Wishon filed a chapter 11 case pro se on March 14, 2007,
18 Case No. 07-30869. In her chapter 11 petition, she stated her address as
19 15959 Jackpine Loop, LaPine, Oregon 97739. Case No. 07-30869 Docket
20 No. 2, at 1. On April 4, 2007, Ms. Wishon filed a change of address
21 indicating that her address was changed to P.O. Box 648, LaPine, Oregon
22

23 ¹Unless otherwise indicated, all chapter, section and rule
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the
25 Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

26 ²Unless otherwise indicated, all "Docket No." references are to the
docket in Ms. Wishon's pending chapter 13 case, Case No. 09-31219.

1 97739. Case No. 07-30869 Docket No. 19, at 1. That case was dismissed
2 on the United States Trustee's motion for cause by order entered on
3 July 13, 2007. Case No. 07-30869 Docket No. 94. Thereafter, Ms. Wishon
4 moved to reopen her chapter 11 case on August 29, 2007. Case No. 07-
5 30869 Docket No. 96. Her motion to reopen was denied by order entered on
6 August 30, 2007. Case No. 07-30869 Docket No. 99. Ms. Wishon did not
7 appeal the dismissal of her chapter 11 case.

8 Ms. Wishon filed the current case as a chapter 7 case on
9 February 27, 2009, stating her address as 15959 Jackpine Loop, LaPine,
10 Oregon 97739. Docket No. 1, at 1. The Bank purchased the 15959 Jackpine
11 Loop, LaPine, Oregon property (the "Property"), on which Ms. Wishon
12 resided, at a nonjudicial foreclosure sale conducted on January 16, 2009
13 and recorded a Trustee's Deed with respect to the Property on January 20,
14 2009. See Exhibit 1, at 1-2. Ms. Glogowski testified at the Hearing
15 that, "Ms. Wishon, and others accompanying Ms. Wishon, were present at
16 [the foreclosure] sale," but no litigation was commenced by Ms. Wishon or
17 anyone on her behalf to block the foreclosure sale. Hearing Transcript,
18 Docket No. 59, at 27-28.

19 On or about January 29, 2009, the Bank filed an unlawful
20 detainer action (the "First Unlawful Detainer Action") in Deschutes
21 County Circuit Court ("Circuit Court") to obtain possession of the
22 Property. Declaration of Ms. Glogowski, Docket No. 39, at 1. Following
23 a trial in the First Unlawful Detainer Action, the Circuit Court issued a
24 Notice of Restitution that required Ms. Wishon to vacate the Property.
25 Id. The Circuit Court's Notice of Restitution in the First Unlawful
26 Detainer Action apparently precipitated Ms. Wishon's current bankruptcy

1 filing.

2 Ms. Wishon initiated this case by filing her chapter 7
3 bankruptcy petition without filing schedules, a statement of financial
4 affairs or a Statement of Current Monthly Income. By order entered on
5 February 27, 2009, the Court required Ms. Wishon to file her chapter 7
6 schedules, statement of financial affairs and a Statement of Current
7 Monthly Income within 15 days following the case filing date. See Docket
8 No. 6. The § 341(a) meeting of creditors in Ms. Wishon's case was
9 scheduled for April 7, 2009 at 12:30 p.m. See Docket No. 7. Ms. Wishon
10 never filed her chapter 7 schedules, statement of financial affairs or
11 Statement of Current Monthly Income.

12 On March 30, 2009, the chapter 7 trustee filed a request that
13 Ms. Wishon's chapter 7 case not be dismissed in spite of her failure to
14 file required documents because the trustee had determined that there
15 might be assets available for administration. See Docket No. 16. The
16 trustee's request was set for a telephone hearing on April 29, 2009 at
17 10:00 a.m. See Docket No. 19.

18 On April 1, 2009, the Bank filed a motion for relief from stay
19 ("Motion for RFS") to evict Ms. Wishon from the Property. See Docket
20 No. 17. The Motion for RFS was served on Ms. Wishon at the Property
21 address, which was the address she stated in her bankruptcy petition.
22 Ms. Wishon did not file a response to the Motion for RFS. A default
23 order granting the requested relief was entered on April 23, 2009. See
24 Docket No. 26. Notice of entry of the order granting the Motion for RFS
25 was mailed to Ms. Wishon at the Property address. See Docket No. 28.

26 On April 3, 2009, Ms. Wishon filed a motion to convert her

1 bankruptcy case to chapter 13. In her motion, Ms. Wishon stated her
2 address as P.O. Box 648, LaPine, Oregon 97739. See Docket No. 20. Her
3 motion was granted, and her case was converted to chapter 13 by order
4 entered on the same day. The conversion order required Ms. Wishon to
5 file chapter 13 schedules, a statement of financial affairs, a Statement
6 of Current Monthly Income on Form B22C and a chapter 13 plan within 15
7 days following the date of entry of the conversion order. See Docket No.
8 22. The § 341(a) meeting in Ms. Wishon's chapter 13 case was scheduled
9 for May 8, 2009 at 2:30 p.m. See Docket No. 25. Notices of both the
10 conversion order and the § 341(a) meeting date were mailed to Ms. Wishon
11 at the Property address. See Docket Nos. 24 and 27.

12 On April 29, 2009, I held a hearing on the chapter 7 trustee's
13 request not to dismiss Ms. Wishon's bankruptcy case. Only counsel for
14 the chapter 13 trustee appeared at the hearing. The record of
15 proceedings reflects that if Ms. Wishon did not file the required chapter
16 13 documents, the case would be returned to me for further disposition.
17 See Docket No. 29.

18 On May 6, 2009, the Court scheduled a further hearing for
19 June 12, 2009 at 11:30 a.m. on the chapter 7 trustee's request that Ms.
20 Wishon's bankruptcy case not be dismissed for failure to file documents.
21 See Docket No. 30. Notice of the hearing was served on Ms. Wishon at the
22 Property address. See Docket No. 31.

23 On May 8, 2009, the chapter 13 trustee filed a motion to
24 reconvert Ms. Wishon's bankruptcy case to chapter 7 because she failed to
25 appear at the § 341(a) meeting. See Docket No. 30. A hearing on the
26 chapter 13 trustee's motion to reconvert was scheduled for June 12, 2009

1 at 11:30 a.m. Again, notice of the hearing was served on Ms. Wishon at
2 the Property address. See Docket Nos. 33 and 35.

3 On May 27, 2009, the chapter 7 trustee withdrew his request
4 that Ms. Wishon's bankruptcy case not be dismissed because he determined
5 that there were no assets available for a meaningful distribution to
6 unsecured creditors. See Docket No. 36.

7 On June 10, 2009, Ms. Wishon filed a document titled "SECOND
8 NOTICE FOR CHANGE OF ADDRESS," claiming that she previously had sent a
9 notice of change of address to the Court on or about March 19, 2009,
10 changing her address for notice purposes to P.O. Box 648, LaPine, Oregon
11 97739. See Docket No. 37. On the same date, she filed the Motion to
12 Reinstate Stay, asserting that she never received notice of the Bank's
13 Motion for RFS and requesting that the automatic stay in her bankruptcy
14 case be reinstated so that she would not be evicted based on an
15 intervening state court order. See Docket No. 38.

16 On June 12, 2009, I held a preliminary hearing on the chapter
17 13 trustee's motion to reconvert Ms. Wishon's chapter 13 case to
18 chapter 7. Ms. Wishon and counsel for the chapter 13 trustee attended
19 the hearing. At the time of the hearing, Ms. Wishon still had not filed
20 her chapter 13 schedules and statement of financial affairs, her
21 Statement of Current Monthly Income or her chapter 13 plan. I advised
22 the parties at the hearing that I would enter the Order to Show Cause and
23 would set Ms. Wishon's Motion to Reinstate Stay for an evidentiary
24 hearing. See Docket No. 41. The Hearing was scheduled for July 17, 2009
25 at 1:00 p.m. See Docket No. 42. The Order to Show Cause was entered on
26 June 22, 2009. See Docket No. 45.

1 On June 15, 2009, Ms. Glogowski filed her Declaration in behalf
2 of the Bank, asserting that following the entry of the Court's order
3 granting the Motion for RFS, the Bank filed a second unlawful detainer
4 action (the "Second Unlawful Detainer Action") in the Circuit Court. She
5 further stated that, "Following a full trial, in which Ms. Wishon was
6 present, presented evidence, and called witnesses, the [Circuit Court]
7 again granted possession of the Property to the [Bank] on June 5, 2009."
8 Declaration of Katrina E. Glogowski ("Glogowski Declaration"), Docket
9 No. 39, at 2. She further asserted that a Notice of Restitution was
10 issued in the Second Unlawful Detainer Action on or about June 8, 2009.
11 Ms. Glogowski declared that Ms. Wishon raised issues as to lack of
12 knowledge of the order granting the Bank's Motion for RFS and disputing
13 ownership of the Property before the Circuit Court in the Second Unlawful
14 Detainer Action and attached a copy of Ms. Wishon's Motion for Stay
15 Pending Appeal and for Stay Pending Further Hearing and Order ("Motion
16 for Stay Order"), raising the same issues, filed with the Circuit Court,
17 to her Declaration. Glogowski Declaration, Docket No. 39, at 2 and 4-
18 12.

19 Ms. Wishon filed an opposing Declaration on June 22, 2009,
20 asserting, among other things, that she owned the Property free of any
21 claim of the Bank and attaching another copy of the Motion for Stay Order
22 as Exhibit A. See Declaration of Patricia Wishon, Docket No. 47, at 4
23 and 5-12. On the same day, Ms. Wishon filed schedules and a statement of
24 financial affairs. See Docket No. 46. In her summary of schedules and
25 Schedule A, Ms. Wishon states that she does not have any interest in any
26 real property, and she does not claim a homestead exemption on her

1 Schedule C, but she does list the Bank as a creditor in her Schedule F.
2 See Docket No. 46, at 1, 3, 7 and 13. In her Schedule I, Ms. Wishon
3 states her average monthly income is \$363.56, and her average monthly
4 expenses are \$450.00, leaving a deficit each month of -\$86.44. See
5 Docket No. 46, at 19-20. Ms. Wishon signed the Declaration at the end of
6 her schedules acknowledging that she had read them and that they were
7 "true and correct to the best of my knowledge, information, and belief"
8 under penalty of perjury. Docket No. 46, at 22. In her statement of
9 financial affairs, likewise signed under penalty of perjury, Ms. Wishon
10 stated that she had received no income, either from employment or
11 operation of a business or from any other source, during the period of
12 the calendar year immediately preceding her bankruptcy filing or for the
13 two prior calendar years. Docket No. 46, at 23-24 and 33. On the same
14 day, Ms. Wishon tendered for filing a chapter 13 plan form and a
15 Statement of Current Monthly Income on Form B22C, but they were returned,
16 as the forms she filed were blank. See Docket No. 48.

17 At the Hearing, Ms. Wishon, Ms. Glogowski and counsel for the
18 chapter 13 trustee appeared. The Bank's Exhibit 1, a copy of its
19 recorded Trustee's Deed for the Property, was admitted. Ms. Wishon
20 submitted copies of an amended mailing matrix, a completed Statement of
21 Current Monthly Income on Form B22C, a completed chapter 13 plan form,
22 and a revised bankruptcy petition, schedules and statement of financial
23 affairs, that were admitted as her Exhibit A. Ms. Wishon stated that she
24 filed the Exhibit A documents with the Court on the Hearing date.
25 Hearing Transcript, Docket No. 59, at 4. In fact, the Exhibit A
26 documents were received at the Court on July 17, 2009, and Ms. Wishon's

1 chapter 13 plan and Form B22C Statement of Current Monthly Income were
2 docketed. See Docket Nos. 53 and 54. However, her revised bankruptcy
3 petition, schedules and statement of financial affairs were returned by
4 the clerk's staff because she did not tender the required \$26.00 fee to
5 amend the schedules, and it was not clear to the clerk's staff why she
6 filed a complete petition packet. See Docket No. 55. Ms. Wishon has not
7 subsequently filed her amended schedules and statement of financial
8 affairs with the required fee.

9 In her revised schedules, Ms. Wishon now asserts that she owns
10 real property valued at \$9,356,000.00 that is unencumbered. See
11 Exhibit A, Summary of Schedules, Schedule A and Schedule D. She asserts
12 a homestead exemption claim in the Property, valuing it at \$300,000. See
13 Exhibit A, Schedule C. She still lists the Bank as an unsecured creditor
14 in a disputed, but unspecified amount. See Exhibit A, Schedule F. She
15 states her average monthly income as \$427.63 and her average monthly
16 expenses as \$450.00, placing her in a deficit of -\$22.37 each month. See
17 Exhibit A, Schedules I and J. As with the schedules and statement of
18 financial affairs previously filed with the Court, the Exhibit A
19 schedules and statement of financial affairs are signed by Ms. Wishon as
20 "true and correct to the best of my knowledge, information, and belief"
21 under penalty of perjury. See Exhibit A, declarations concerning
22 debtor's schedules and statement of financial affairs.

23 In her chapter 13 plan, Ms. Wishon proposes to pay \$100 a month
24 for 36 months, with her plan payments to begin on September 10, 2009,
25 estimating that her unsecured creditors will receive a dividend of
26 approximately 0% on their claims. See Exhibit A, Chapter 13 Plan dated

1 06/13/09, and Docket No. 54, at 1 and 2.

2 At the Hearing, when asked if she had read her schedules after
3 they were prepared, Ms. Wishon stated that, "I have kind of glanced
4 through them a little bit, yes." Hearing Transcript, Docket No. 59,
5 at 4.

6 Ms. Wishon testified as follows as to the substance of her
7 argument in support of the Motion to Reinstate Stay: "I believe because
8 of a problem with an address change that I had filed back in March was
9 not posted with the bankruptcy court, I was not notified of anything
10 going on in the bankruptcy until I was suddenly surprised during an
11 eviction hearing that Ms. Glogowski had filed motions to lift the stay
12 and was granted that." Hearing Transcript, Docket No. 59, at 7. Ms.
13 Wishon testified that she had appealed the eviction judgment entered in
14 the Second Unlawful Detainer Action. Hearing Transcript, Docket No. 59,
15 at 10. She further testified that she had raised her issues as to
16 ownership of the Property before the Circuit Court in the Second Unlawful
17 Detainer Action. Hearing Transcript, Docket No. 59, at 11 and 12. She
18 also stated that her motion for stay pending appeal before the Circuit
19 Court had been denied. Hearing Transcript, Docket No. 59, at 14. She
20 subsequently was evicted from the Property. Hearing Transcript, Docket
21 No. 59, at 15.

22 Ms. Wishon also testified that she had no regular employment
23 since 2003. Her sole source of income was "a little bit of income from
24 some royalties that my deceased husband had left me through an
25 inheritance." Hearing Transcript, Docket No. 59, at 16. She further
26 admitted that her expenses exceeded her income. Hearing Transcript,

1 Docket No. 59, at 35. However, Ms. Wishon testified that she wanted the
2 chapter 13 bankruptcy to continue because "I do have new evidence to
3 present to probably some adversary proceeding in the future." Hearing
4 Transcript, Docket No. 59, at 19.

5 In presenting her case in behalf of the Bank, Ms. Glogowski
6 noted that the Court's docket does not reflect any notice of change of
7 address received from Ms. Wishon until "more than 60 days after the order
8 granting [the Motion for RFS] was entered." Hearing Transcript, Docket
9 No. 59, at 23. With respect to the Motion for RFS and the order granting
10 it, Ms. Glogowski testified as follows:

11 I did comply with the court rules concerning mailing
12 of the notice, service of the notice. I waited the
13 statutory time period. And in fact waited longer than
14 the statutory time period, received no response,
15 submitted my order, and proceeded in state court with
16 the [Second Unlawful Detainer Action].

17 Hearing Transcript, Docket No. 59, at 24.

18 With respect to the trial in the Second Unlawful Detainer
19 Action, Ms. Glogowski testified:

20 Ms. Wishon had a full trial in which she had evidence,
21 in which witnesses testified on her behalf, at which
22 she was allowed great leeway by the state court to
23 have every opportunity to present anything she thought
24 was relevant in this matter, including the lack of
25 knowledge of the order granting relief from stay, the
26 disputed ownership of the [Property], and her
assertion that I, myself, misled the court concerning
the ownership of the [Property]. At trial court she
lost on all of those issues. And those issues once
again are before the court of appeals.

Hearing Transcript, Docket No. 59, at 27.

Finally, with respect to the issue of Ms. Wishon's change of
address, Ms. Glogowski testified as follows:

1 [S]he has lived [on the Property] basically her whole
2 life and decides after I have started eviction
3 proceedings, and after she had filed bankruptcy, to
4 rent a PO Box without notifying anybody. And I would
5 like the court to take that into consideration. That
6 she didn't move. She was still at her house. She was
7 at her house on April 1st when I mailed her the
[Motion for RFS]. She was at her house on April 23rd
when the order granting relief from stay was granted.
She was at her house when the bankruptcy noticing
center mailed her a copy of the order granting relief
from stay. It is not like she was not there.

Hearing Transcript, Docket No. 59, at 29-30.

Counsel for the chapter 13 trustee was present during the
Hearing but took no position on the Court's Order to Show Cause.

At the close of the Hearing, I took the matters under
submission.

Jurisdiction

I have core jurisdiction to decide the issues presented by the
Order to Show Cause and the Motion to Reinstate Stay under 28 U.S.C.
§§ 1334 and 157(b)(2)(A), (G) and (O).

Issues

- 1) Should Ms. Wishon's current bankruptcy case continue as a case in
chapter 13, or should it be dismissed, with or without a bar to refiling?
- 2) In light of entry of the Court's order granting the Motion for RFS on
April 23, 2009, does the Court have the authority to grant the Motion to
Reinstate Stay?
- 3) If the Court has authority to grant the Motion to Reinstate Stay,
should the Motion to Reinstate Stay be granted based on the record?

Discussion

- A) Order to Show Cause

Chapter 13 generally allows individual debtors with regular income to reorganize their financial affairs over a period of three to five years through a plan that includes the debtor's continuing covenants with his or her creditors and normally is funded by future income. 8 Collier on Bankruptcy ¶ 1300.02, at 1300-12 (15th ed. rev. 2009) ("Chapter 13 is designed to facilitate adjustments of all types of debts of individuals with regular income through extension and composition plans funded out of future income, under the protection of the court."). Although chapter 13 originally was conceived as a means for wage earners and salaried individuals, who could pay at least a portion of their debts over time, to obtain bankruptcy relief, the "regular income" requirement has been liberally interpreted to encompass debtors with virtually any source of income "so long as there is available, after payment of necessary expenses, an amount sufficient to fund a plan." 1 Keith M. Lundin, Chapter 13 Bankruptcy § 2.1, at 2-1 (3d ed. 2007-1). However, courts have held that debtors with inadequate income to pay their ordinary expenses are not eligible for chapter 13 relief. Id. § 8.1, at 8-1, citing In re Schauer, No. 99-31918, 2000 WL 33792712, at *6-*7 (Bankr. D.N.D. Aug. 14, 2000); and In re Smith, 234 B.R. 852, 854 (Bankr. M.D. Ga. 1999).

The problems in this case start from Ms. Wishon's apparent lack of understanding that the benefits of bankruptcy carry some accompanying burdens. Her current case was filed originally as a chapter 7 case, in an attempt to postpone and ultimately avoid the consequences of the judgment and Notice of Restitution entered by the Circuit Court in the First Unlawful Detainer Action. Her case was commenced with a "bare"

1 filing--she filed the bankruptcy petition and a statement confirming that
2 she had obtained prepetition credit counseling, but she did not file
3 schedules, a statement of financial affairs or a Statement of Current
4 Monthly Income.

5 The Court issued an order on February 27, 2009, requiring Ms.
6 Wishon to file her schedules, statement of financial affairs and
7 Statement of Current Monthly Income within 15 days following the case
8 filing date, approximately three weeks before she allegedly sent her
9 first address change notice to the Court. Ms. Wishon ignored the Court's
10 order. In fact, she never filed her chapter 7 schedules, statement of
11 financial affairs and Statement of Current Monthly Income.

12 Following conversion of her bankruptcy case to chapter 13 on
13 her motion, the Court issued a second order requiring the filing of
14 schedules, a statement of financial affairs, a Statement of Current
15 Monthly Income on Form B22C and a chapter 13 plan. The second order
16 required Ms. Wishon to file the required documents within 15 days
17 following the date of entry of the conversion order. She ignored that
18 order too. She finally filed chapter 13 schedules and a statement of
19 financial affairs that could be docketed on June 22, 2009, 63 days after
20 the conversion order was entered. Although Ms. Wishon tendered for
21 filing a Form B22C and a chapter 13 plan form as well at that time, they
22 were returned by the Court unfiled because she attempted to file blank
23 forms!

24 Ms. Wishon's initial schedules are patently inaccurate: This
25 case is all about Ms. Wishon's claims that she has been wrongfully
26 dispossessed of real property she owns. Yet, in her Schedule A, she does

1 not claim to own any real property, and she does not claim a homestead
2 exemption on her Schedule C. Her Schedules I and J indicate that her
3 expenses exceed her income by \$86.44 every month, and in her statement of
4 financial affairs, she states that she has had no income of any kind for
5 the calendar year prior to her bankruptcy filing and for the two
6 preceding calendar years. She filed her schedules and statement of
7 financial affairs as "true and correct to the best of my knowledge and
8 belief" under penalty of perjury. Yet, when asked at the Hearing if she
9 had read her schedules before they were filed, she testified that, "I
10 have kind of glanced through them a little bit, yes." Hearing
11 Transcript, Docket No. 59, at 4.

12 At the Hearing, Ms. Wishon presented amended forms of schedules
13 and a statement of financial affairs, a Statement of Current Monthly
14 Income on Form B22C and a completed plan form in her Exhibit A. In her
15 new Schedule A, she claims that she owns unencumbered real property
16 valued at \$9,356,000.00 and asserts a homestead exemption claim in the
17 Property, valuing it at \$300,000. Her Schedules I and J still show a
18 deficit of income versus expenses, and the same \$455.00 of gross monthly
19 income is shown on her Form B22C Statement of Current Monthly Income.
20 See Docket No. 53. In her statement of financial affairs, she now
21 indicates that she has received the same amount of income (\$455.00) each
22 month for the last three calendar years from a source(s) other than
23 employment or business income. Her completed plan form and Form B22C
24 were accepted and docketed on the Hearing date, but her amended schedules
25 and statement of financial affairs were stricken for, among other
26 reasons, because she did not tender the \$26.00 amendment fee. She

1 subsequently has not tendered the fee or resubmitted the amended
2 schedules and statement of financial affairs for filing.

3 The chapter 13 plan filed by Ms. Wishon reflects a fundamental
4 lack of understanding as to how chapter 13 works: Generally, the first
5 plan payment is due in the first full month after a chapter 13 case is
6 filed or converted from chapter 7, as § 1322(a)(1) provides for the
7 commitment of all of the debtor's future income required to fund the
8 plan. Ms. Wishon's plan provides that her first payment will be due on
9 September 10, 2009, over five months after her case was converted from
10 chapter 7. Ms. Wishon proposes plan payments of \$100.00 a month for 36
11 months, but she does not explain where the money to fund the plan will
12 come from, since her schedules reflect that she has no disposable income
13 available to fund a chapter 13 plan. Her plan thus is not feasible for
14 purposes of § 1325(a)(6). She further estimates that her unsecured
15 creditors will receive a distribution of approximately "0%" under her
16 plan, but § 1325(b)(4) requires that creditors receive at least as much
17 through a chapter 13 plan as they would receive from a liquidation of her
18 assets in chapter 7. It is not clear from Ms. Wishon's schedules, either
19 as filed or as indicated on Exhibit A, what the total amount of allowed
20 claims is likely to be in her chapter 13 case. However, since Ms. Wishon
21 now states that she owns unencumbered real property worth \$9,356,000.00,
22 her total proposed plan payments of \$3,600 will not even pay the \$13,477
23 total claims she lists in Section 2(b)(2) of the plan plus administrative
24 expenses, let alone any other claims that might be allowed. In light of
25 the value of assets she now claims, a confirmable chapter 13 plan in Ms.
26 Wishon's case most likely would require a minimum 100% dividend

1 distribution to her creditors. In other words, Ms. Wishon's chapter 13
2 plan is manifestly not confirmable under the requirements of the
3 Bankruptcy Code, even if she had disposable income available to fund it.

4 Under § 109(g)(1), I am authorized to dismiss a chapter 13 case
5 with a bar to refiling of up to 180 days "for willful failure of the
6 debtor to abide by orders of the court, or to appear before the court in
7 proper prosecution of the case...." I find that it is appropriate to
8 dismiss Ms. Wishon's chapter 13 case as an abuse with a 180-day bar to
9 refiling for the following reasons.

10 Ms. Wishon filed this case on February 27, 2009 and disregarded
11 two orders of the Court to file schedules, a statement of financial
12 affairs and a Statement of Current Monthly Income. She only filed
13 schedules and a statement of financial affairs that were clearly, if not
14 wildly inaccurate ten days following the preliminary hearing on the
15 chapter 13 trustee's motion to reconvert her case to chapter 7, on the
16 same date that the Order to Show Cause was issued.

17 Early and accurate debtor disclosures of their assets,
18 liabilities and financial affairs are essential to allow the bankruptcy
19 system to function equitably and effectively.

20 [T]he very purpose of certain sections of the
21 [Bankruptcy Code] is to make certain that those who
22 seek the shelter of the bankruptcy code do not play
23 fast and loose with their assets or with the reality
24 of their affairs. The statutes are designed to insure
25 that complete, truthful, and reliable information is
26 put forward at the outset of the proceedings, so that
decisions can be made by the parties in interest based
on fact rather than fiction. As we have stated,
'[t]he successful functioning of the bankruptcy act
hinges both upon the bankrupt's veracity and his
willingness to make a full disclosure.' Mascolo, 505
F.2d at 278. Neither the trustee nor the creditors

1 should be required to engage in a laborious tug-of-war
2 to drag the simple truth into the glare of daylight.
3 See in re Tabibian, 289 F.2d 793, 797 (2d Cir. 1961);
4 In re Shebel, 54 B.R. at 202.

5 Tully v. Boroff (In re Boroff), 818 F.2d 106, 110 (1st Cir. 1987).

6 When schedules and the statement of financial affairs are
7 filed, the requirement that they be signed as "true and correct" under
8 penalty of perjury mandates that they be prepared and reviewed carefully
9 for accuracy: more than a cursory review is required. See, e.g., Hatton
10 v. Spencer (In re Hatton), 204 B.R. 477, 483 (Bankr. E.D. Va. 1997)
11 ("Courts...have stressed that the providing of false information under
12 oath in a bankruptcy proceeding is not a matter to be taken lightly.");
13 Mosley v. Sims (In re Sims), 148 B.R. 553, 557 (Bankr. E.D. Ark. 1992):

14 Willie Sims asserts that he merely "glanced over" the
15 petition but "didn't really understand it." However,
16 the Bankruptcy Code requires more than a "glance over"
17 in reporting assets and transactions. Indeed, a mere
18 "glance over" constitutes a cavalier and reckless
19 disregard for truth which is inconsistent with the
20 relief to be afforded the honest debtor.

21 When asked at the Hearing whether she had read her schedules
22 prior to their being filed, Ms. Wishon, like Mr. Sims, testified that she
23 merely "had glanced over them a little bit." She obviously did not grasp
24 the significance of the requirement that her schedules and statement of
25 financial affairs give an accurate picture of her assets, liabilities and
26 financial transactions. Whatever Ms. Wishon understood about the
27 information she was asked to provide in the schedules and statement of
28 financial affairs that she filed with the Court, the completed schedules
29 and statement of financial affairs that she did file are neither accurate
30 nor credible.

1 Ms. Wishon argues that the deficiencies in her filings should
2 be overlooked because she did not receive copies of Court orders and
3 filings due to her change of address, which was not received after she
4 mailed it on or about March 19, 2009. Whether or not the address change
5 in fact was sent to the Court when Ms. Wishon says it was, a matter that
6 I will discuss at greater length later in this Memorandum Opinion, the
7 facts remain that the Court's order requiring Ms. Wishon to file her
8 chapter 7 schedules, statement of financial affairs and Statement of
9 Current Monthly Income was entered and sent to her weeks before the
10 purported address change, and in any event, it is the duty of the debtor,
11 whether represented or acting pro se, to monitor proceedings in a
12 bankruptcy case where he or she has invoked bankruptcy protection.
13 Delaney v. Alexander (In re Delaney), 29 F.3d 516, 518 (9th Cir. 1994);
14 Miyao v. Kuntz (In re Sweet Transfer & Storage, Inc.), 896 F.2d 1189,
15 1193 (9th Cir. 1990); Warrick v. Birdsell (In re Warrick), 278 B.R. 182,
16 187 (9th Cir. BAP 2002); Key Bar Investments, Inc. v. Cahn (In re Cahn),
17 188 B.R. 627, 632 (9th Cir. BAP 1995). Ms. Wishon did not take any
18 action to keep her chapter 13 case alive until two days before the
19 preliminary hearing on the chapter 13 trustee's motion to reconvert her
20 case to chapter 7, approximately three and one-half months after her
21 bankruptcy case was filed and more than a month and a half after the
22 Bank's Motion for RFS had been granted.

23 Ms. Wishon's first chapter 13 plan was returned to her unfiled
24 because she attempted to file a blank plan form. The plan she filed on
25 the day of the Hearing, over four and one-half months after her
26 bankruptcy case was filed, is not consistent with Bankruptcy Code

1 requirements and is not feasible. Moreover, based on both sets of
2 schedules that Ms. Wishon has filed or attempted to file with the Court,
3 she does not have any disposable income to fund a chapter 13 plan.

4 In light of this record, why is Ms. Wishon here? The answer to
5 that question is provided through her testimony at the Hearing: Ms.
6 Wishon testified that she had "new evidence to present to probably some
7 adversary proceeding in the future." Hearing Transcript, Docket No. 59,
8 at 19. When asked if in the event I determined that it was inappropriate
9 to continue her case in chapter 13, should it be reconverted to
10 chapter 7, Ms. Wishon testified that, "I would hope we could stay in
11 chapter 13 because there are other issues in this." In other words, Ms.
12 Wishon's real goal in this case, brushing aside the requirements for a
13 debtor to proceed in chapter 13, is to open up a new battle line(s) in
14 her litigation wars. And she does not want to relinquish control of any
15 legal claims that she may have to a chapter 7 trustee.

16 I recognize that Ms. Wishon feels very strongly both that she
17 has been wronged and that she has been wrongfully dispossessed of her
18 property. However, right or wrong, her claims do not entitle her to
19 ignore court orders and make up the rules for proceeding in bankruptcy as
20 she sees fit. She has disregarded orders of this Court. She has filed
21 schedules and a statement of financial affairs that are materially
22 inaccurate in spite of her representations that they were true and
23 correct "under penalty of perjury." And her filings to date in this case
24 do not admit of the possibility that she ever could propose a feasible
25 plan in chapter 13. In light of these findings, I conclude that her
26 chapter 13 case is an abuse and should be dismissed with a 180-day bar to

1 refiling any case in bankruptcy under § 109(g)(1).

2 B) Authority to grant a motion to reinstate the automatic stay

3 On April 1, 2009, the Bank filed the Motion for RFS, seeking
4 relief from the automatic stay of § 362(a) to proceed with an unlawful
5 detainer action in the Circuit Court against Ms. Wishon, and the record
6 reflects that it was properly filed and served on Ms. Wishon at the
7 address she stated in her bankruptcy petition. When Ms. Wishon did not
8 file a response to the Motion for RFS by the deadline, the Bank submitted
9 a default order granting the Motion for RFS, which the Court entered on
10 April 23, 2009. Ms. Wishon did not file her Motion to Reinstate Stay
11 until June 10, 2009, weeks beyond the date when she could have appealed
12 the order granting the Motion for RFS.

13 The law in the Ninth Circuit generally is that once the
14 automatic stay of § 362 has been lifted, like Humpty Dumpty, it cannot be
15 "put back together again" or reinstated. See Canter v. Canter (in re
16 Canter), 299 F.3d 1150, 1155 n.1 (9th Cir. 2002):

17 Because the stay under § 362 is "automatic" and "self-
18 executing" only upon the filing of a bankruptcy
19 petition, no authority exists for "reinstating" an
20 automatic stay that has been lifted. We have
21 expressly recognized that "the bankruptcy automatic
22 stay is differentiated from a bankruptcy court-ordered
23 injunction, which issues under 11 U.S.C. § 105."
24 Andrieu v. Reno, 223 F.3d 1111, 1121 n.4 (9th Cir.
25 2000).

26 As noted in Canter, once the § 362 stay has been lifted, that
is not necessarily the end of the game--the debtor can seek injunctive

1 relief pursuant to the bankruptcy court's authority under § 105(a).³
2 See, e.g., Wedgewood Investment Fund, Ltd. v. Wedgewood Realty Group,
3 Ltd. (In re Wedgewood Realty Group, Ltd.), 878 F.2d 693, 700 (3d Cir.
4 1989); In re Staff Investment Co., 146 B.R. 256, 260 n.7 (Bankr. E.D.
5 Cal. 1993). However, procedurally, Rule 7001(7) requires that injunctive
6 relief be sought through an adversary proceeding rather than by motion.
7 See, e.g., Ramirez v. Whelan (In re Ramirez), 188 B.R. 413, 416 (9th
8 Cir. BAP 1995) (Klein, J. concurring) ("In order to have a vacated stay
9 'reimposed,' one must ordinarily file an adversary proceeding seeking an
10 injunction under 11 U.S.C. § 105.") (citations omitted); and In re Staff
11 Investment Co., 146 B.R. at 260 n.7. Ms. Wishon has not filed an
12 adversary proceeding seeking injunctive relief in this case.

13 What Ms. Wishon did file was the Motion to Reinstate Stay.
14 Although she cites no authority in her motion, I interpret the Motion to
15 Reinstate Stay as a motion to relieve Ms. Wishon from a final order for
16 excusable neglect under Federal Rule of Civil Procedure 60(b)(1),
17 applicable in bankruptcy cases under Rule 9024.⁴ A motion under Rule

18
19 ³ Section 105(a) provides in relevant part as follows:

20 The court may issue any order, process, or judgment that is
21 necessary or appropriate to carry out the provisions of this
22 title.

23 ⁴ Fed. R. Civ. P. 60(b)(1) provides:

24 On motion and just terms, the court may relieve a party...from
25 a final judgment, order, or proceeding for the following
26 reasons: (1) mistake, inadvertence, surprise, or excusable
neglect;....

(continued...)

1 60(b) (1) may be made to vacate an order no more than one year following
2 the date of entry of the subject order. Fed. R. Civ. P. 60(c) (1). The
3 Motion to Reinstate Stay was filed well within that time limit.

4 In appropriate circumstances, Rule 60(b) provides a tool for
5 federal courts to revisit a judgment or order that otherwise has become
6 final. "Rule 60(b) [complements] the discretionary power that bankruptcy
7 courts have as courts of equity 'to reconsider, modify or vacate their
8 previous orders so long as no intervening rights have become vested in
9 reliance on the orders.'" Zurich Am. Ins. Co. v. International Fibercom,
10 Inc. (In re International Fibercom, Inc.), 503 F.3d 933, 940 (9th Cir.
11 2007) (citations omitted). Although there are no Ninth Circuit decisions
12 directly on point, courts elsewhere have held that Rule 60(b) provides
13 authority for a bankruptcy court to reconsider and vacate an order
14 granting relief from stay and reinstate the automatic stay. See, e.g.,
15 State Bank v. Gledhill (In re Gledhill), 76 F.3d 1070, 1078-80 (10th Cir.
16 1996); Camacho v. Doral Fin. Corp. (In re Camacho), 361 B.R. 294, 299-300
17 (1st Cir. BAP 2007). Rule 60(b) thus provides potential authority to
18 support Ms. Wishon's Motion to Reinstate Stay. The question then becomes
19 whether the record in this case supports granting the relief in terms of
20 retroactive reinstatement of the stay applicable to the Bank's efforts to
21 evict Ms. Wishon from the Property, that Ms. Wishon requests.

22
23 ⁴(...continued)

24 I do not treat the Motion to Reinstate Stay as a motion to alter or
25 amend a judgment as provided for in Federal Rule of Civil Procedure 59,
26 applicable in bankruptcy cases under Rule 9023, because Ms. Wishon's
motion was not filed within ten days following entry of the order on the
Bank's Motion for RFS, as required by Federal Rule of Civil Procedure
59(b) .

1 C) Reinstatement of the stay is not appropriate in this case

2 Ms. Wishon argues that I should vacate the order granting
3 relief from stay to the Bank and reinstate the automatic stay retroactive
4 to the date of the order granting the Motion for RFS because she did not
5 receive notice of the Motion for RFS or the resulting order terminating
6 the stay. She argues she is entitled to that relief because she mailed
7 her change of address to the Court on or about March 19, 2009, but her
8 change of address was not received by the Court, resulting in her not
9 receiving documents and orders until after she filed her "SECOND NOTICE
10 FOR CHANGE OF ADDRESS" on June 10, 2009. As noted above, I interpret Ms.
11 Wishon's Motion to Reinstate Stay as arguing that the order granting the
12 Motion for RFS should be vacated based on her excusable neglect in these
13 circumstances under Rule 60(b)(1).

14 The framework for considering whether a party should be
15 relieved from the effects of an order on the basis of "excusable neglect"
16 was outlined by the Supreme Court in Pioneer Investment Services Co. v.
17 Brunswick Assoc. Limited Partnership, 507 U.S. 380, 395 (1993):

18 [W]e conclude that the determination is at bottom an
19 equitable one, taking account of all relevant
20 circumstances surrounding the party's omission. These
21 include...the danger of prejudice to the debtor, the
22 length of the delay and its potential impact on
judicial proceedings, the reason for the delay,
including whether it was within the reasonable control
of the movant, and whether the movant acted in good
faith.

23 In Briones v. Riviera Hotel & Casino, 116 F.3d 379, 382 (9th Cir. 1997),
24 the Ninth Circuit held that the Pioneer Investment analytical framework
25 applies in considering "excusable neglect" in the Rule 60(b)(1) context.
26 Accordingly, I apply a "totality of the circumstances" analysis to

1 determine if Ms. Wishon's failure to oppose the Bank's Motion for RFS is
2 "excusable" neglect.

3 At the outset, Ms. Wishon's failure to oppose the Motion for
4 RFS was a product of her own neglect in failing to monitor the docket in
5 her current bankruptcy case. As noted above, even though Ms. Wishon was
6 acting pro se, she had a duty to monitor proceedings in her bankruptcy
7 case--a duty which she disregarded, in spite of the fact that the Court
8 sent her an order requiring her to file schedules, a statement of
9 financial affairs and a Statement of Current Monthly Income by a deadline
10 well in advance of her alleged address change. She should have known
11 that her failure to comply with that order could have a substantial
12 adverse impact on her, making it common sense to maintain contact with
13 what was going on in her bankruptcy case.

14 Her excuse is that she sent a notice of change of address to
15 the Court on or about March 19, 2009 that apparently was not received by
16 the Court. Thereafter, until she filed her "SECOND NOTICE FOR CHANGE OF
17 ADDRESS," she asserts that she did not receive Court filings, notices and
18 orders, although the Court record does not reflect that any documents
19 sent to Ms. Wishon at the Property address were returned. It was during
20 this alleged lapse in receiving Court documents that the Motion for RFS
21 was filed, and the order granting it was entered.

22 However, except for Ms. Wishon's fervently-held beliefs that
23 she has been wrongfully deprived of her property and deserves additional
24 opportunities to litigate her claims, I do not find her credible. Her
25 lack of notice explanation is one way to view the facts in this case, but
26 I can think of at least two others:

1 Ms. Wishon may have received the Bank's Motion for RFS and the
2 order granting it without realizing their significance. Then, only when
3 advised at the trial of the Second Unlawful Detainer Action that the
4 order granting its Motion for RFS allowed the Bank to proceed with its
5 efforts to have her evicted from the Property, did Ms. Wishon realize
6 that she needed to try to have the order granting the Motion for RFS set
7 aside.

8 A further scenario allows for the possibility that Ms.
9 Wishon's address change was strategic. She may have arranged for an
10 address change to the P.O. box for the purpose of having a denial of due
11 process argument handy in the event that an order(s) was entered in her
12 bankruptcy case that she disliked. Such a scenario would be far-fetched,
13 except for the fact that Ms. Wishon's address change from the Property,
14 where she continued to reside, to a P.O. box in this case follows exactly
15 the same pattern as occurred in her prior chapter 11 case. See Case No.
16 07-30869 Docket Nos. 2 and 19.

17 All of these factual scenarios are possible, and particularly
18 in light of Ms. Wishon's cavalier disregard for the truth in the
19 schedules and statement of financial affairs that she originally filed
20 with the Court, I cannot determine what actually happened, and I cannot
21 determine if the Motion to Reinstate Stay was filed in good faith.

22 In terms of prejudice, there is no question that Ms. Wishon has
23 been prejudiced by having to contest the Second Unlawful Detainer Action.
24 She lost, and she now has been evicted from the Property, which I
25 recognize is a personal tragedy for Ms. Wishon. However, was she
26 "unfairly" prejudiced by the entry of the order granting the Motion for

1 RFS? The Bank has presented evidence that it purchased the Property at a
2 prepetition foreclosure sale that Ms. Wishon attended, and Ms. Wishon
3 apparently did not file any litigation to stay the foreclosure sale.
4 Following the foreclosure sale, the Bank obtained and recorded a
5 Trustee's Deed (see Exhibit 1) that transferred title to the Property to
6 the Bank. The Bank filed the First Unlawful Detainer Action to obtain an
7 eviction order against Ms. Wishon. Ms. Wishon contested the First
8 Unlawful Detainer Action at trial and lost. She filed this bankruptcy
9 case after the Circuit Court issued a Notice of Restitution. If the
10 Bank's Motion for RFS actually were litigated, it appears that the Bank
11 has "cause" for relief from stay to be granted pursuant to § 362(d)(1),
12 because all Ms. Wishon had at the time of her bankruptcy filing was a
13 mere possessory interest in the Property.

14 In addition, the testimony of Ms. Wishon and Ms. Glogowski at
15 the Hearing was consistent that Ms. Wishon was given the opportunity to
16 present evidence and presented her case in support of her ownership claim
17 to the Property at the trial of the Second Unlawful Detainer Action. The
18 record before me reflects that all issues with respect to ownership of
19 the Property arise under Oregon state law. Although Ms. Wishon lost
20 again at the trial of the Second Unlawful Detainer Action, she has
21 appealed the Second Unlawful Detainer Action judgment to the Oregon Court
22 of Appeals, and that appeal has not been decided. In other words, she
23 retains her remedies under state law.

24 In these circumstances, if I were to grant the Motion to
25 Reinstate Stay and order the relief requested by Ms. Wishon, the Bank
26 might have to file a new motion for relief from stay or to annul the

1 stay, and the parties might have to try a third unlawful detainer action
2 before the Circuit Court. Arguably, the only benefit to Ms. Wishon would
3 be delay, at further substantial expense to the Bank. And I would in
4 effect be voiding a final judgment of the Circuit Court, rendered after a
5 trial, adequate notice of which Ms. Wishon has not contested, and at
6 which Ms. Wishon was given a full opportunity to raise and present
7 evidence in support of her claims.

8 Based on this record, I ultimately conclude that Ms. Wishon has
9 not satisfied the Pioneer Investment standards for "excusable neglect"
10 that would justify my vacating the order granting the Bank's Motion for
11 RFS and reinstating the automatic stay of § 362 retroactive to April 23,
12 2009 under Rule 60(b)(1).

13 Conclusion

14 Based on the foregoing findings of fact and conclusions of law,
15 I will dismiss Ms. Wishon's current chapter 13 case as an abuse pursuant
16 to the Court's Order to Show Cause, with a 180-day bar to Ms. Wishon
17 refiling any further bankruptcy cases, and I will deny Ms. Wishon's
18 Motion to Reinstate Stay. The Court will enter contemporaneously an
19 order consistent with the rulings in this Memorandum Opinion.

20 # # #

21
22 cc: Patricia Jimmy Sue Wishon
23 Katrina E. Glogowski
24 Michael B. Batlan, Trustee
25 Brian D. Lynch, Chapter 13 Trustee
26